No. 05-18-00098-CR

IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

JAMES BERKELEY HARBIN II,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

On appeal from the 204th Judicial District Court of Dallas County, Texas in Cause No. F91-22107-Q

STATE'S BRIEF

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TO THE HONORABLE COURT OF APPEALS:

The State of Texas submits this brief in response to the brief of Appellant, James Berkeley Harbin II.

STATEMENT OF THE CASE

A jury convicted Appellant of murder in 1991 and sentenced him to life in prison. (CR: 26, 34). In June 2015, the Court of Criminal Appeals issued an opinion on Appellant's post-trial writ of habeas corpus application in which it granted Appellant a new punishment hearing. (CR: 108-09). At the conclusion of the new punishment hearing in December 2017, the jury sentenced Appellant to twenty-four years' confinement in the Institutional Division of the Texas Department of Criminal Justice. (RR4: 124; CR: 149). The trial court certified Appellant's right of appeal. (Supp. CR: 4). Appellant filed a motion for new trial, which the trial court overruled, and filed a timely notice of appeal. (CR: 157-58).

STATEMENT OF FACTS

In 1991, Appellant admitted to murdering his father, James Harbin, Sr. ("Jackie") by shooting him once in his back and six times in the back of his head. (RR3: 29, 55, 57, 115; SX 57). Appellant then dumped Jackie's body near a creek bed in Cedar Hill, where a boy found it the next day. (RR3: 55-56, 64-65). At Appellant's 1991 trial, the jury charge included instructions on murder, the

lesser-included offense of voluntary manslaughter, and self-defense. (CR: 29-31). The jury convicted Appellant of murder. (CR: 34).

At Appellant's new punishment hearing in 2017, the State presented the testimony of Cedar Hill Police Detective Steve Higgins, who had testified at Appellant's 1991 trial and was now retired, to provide the jury with the background of the case. (RR3: 50-51, 87). Detective Higgins testified he had quickly identified Appellant as the murderer and arrested him. (RR3: 50-51, 60-62, 65-67). Appellant then wrote and signed a voluntary seventeen-page statement in which he explained how and why he murdered Jackie. (RR3: 65-67; SX 3). The State offered the written statement, which was admitted into evidence in Appellant's 1991 trial, into evidence, and published it to the jury. (RR3: 67-68; SX 3).

In his statement, Appellant claimed he shot Jackie in self-defense. (SX 3). Appellant wrote that Jackie had a history of mental illness, and he had always been afraid for his life when he talked to Jackie about his mother's remarriage, his sexuality, and Jackie's employment status. (RR3: 73; SX 3). Appellant wrote that he had dropped out of high school and was afraid Jackie would become "irate" if he found out before Appellant told him, so he woke Jackie from his sleep and drove him to a secluded spot to disclose the fact. (RR3: 75-76). He claimed that when he told Jackie, Jackie became enraged and they began to

struggle; he was in fear for his life, so he retrieved a gun from his car and shot Jackie, pulling the trigger "until it wouldn't anymore." (SX 3).

Detective Higgins recalled that when Appellant finished writing his statement he informed Appellant he had not signed it, and Appellant stated, "Well, I -- I'm kind of thinking about the book and movie rights." (RR3: 64-65). Detective Higgins testified that Appellant stood out in his memory twenty-seven years after the murder because he was one of only two individuals he had encountered who showed "absolutely no remorse" at any point. (RR3: 80-81).

Samuel Gish, Appellant's cousin, who also wrote a statement after the murder and testified at Appellant's 1991 trial, testified Appellant told him two days before the murder that he was going to kill Jackie and asked Gish to help him do so. (RR3: 22-23, 34-38). Appellant described to Gish how he was going to shoot Jackie, dispose of his body, and park his car to make it appear that he had abandoned it and left town. (RR3: 34-35). Gish refused to assist. (RR3: 36).

Appellant's punishment evidence at the 2017 hearing included testimony from various witnesses that Jackie took multiple medications for severe depression, had been hospitalized and treated for mental illness, and had lost his job because of the illness. (RR3: 106-07, 158-59, 184). Appellant and his sister recounted several instances where Jackie physically and verbally abused and threatened family members. (RR3: 166; RR4: 27-28, 35).

Appellant testified that his statement in 1991 that he shot Jackie in self-defense was false. (RR4: 33-34, 80). He admitted that he had thought about killing Jackie before that night, but he made the decision to do so "approximately at the point" when he was arguing with Jackie about dropping out of school and Jackie made a lewd sexual comment about his mother, girlfriend, and sister. (RR4: 38-39, 41, 59, 62, 67). He testified that he shot Jackie "because it was apparent that this dude was just not gonna stop and not gonna stop." (RR4: 40).

Appellant also presented the testimony of an expert forensic psychologist, Dr. Randall Price, who did not testify at Appellant's 1991 trial and did not meet Appellant until 2012. (RR3: 197-98, 204-06, 221). Dr. Price testified about the conclusions he reached from his 2012 interview of Appellant, which included his opinions that Jackie likely suffered from bipolar disorder and Appellant was suffering from "battered child syndrome" when he shot Jackie. (RR3: 204-05, 209-10, 211-14, 217-18). According to Dr. Price, a battered child perceives that killing is the only way to end the abuse. (RR3: 214-15). Dr. Price testified that three types of offenders commit patricide (or killing of a father): 1) a mentally ill one; 2) an antisocial one; or 3) a severely abused one. (RR3: 215-16). He classified Appellant as the third type of patricide offender. (RR3: 216-18). He testified that such an offender often plans the killing and it is not impulsive.

(RR3: 216). Dr. Price testified that Appellant told him in 2012 he had been thinking about killing his father "for some time," and that Gish's testimony that Appellant talked about killing his father days in advance was not unusual for the severely-abused patricide offender. (RR3: 216). Dr. Price also agreed, however, that Appellant also displayed antisocial characteristics. (RR3: 227-28).

SUMMARY OF ARGUMENT

Appellant has failed to preserve his sole issue for appellate review because his complaint on appeal does not comport with his objection at trial. In the alternative, the trial court did not err in overruling Appellant's request for a sudden-passion instruction in the jury charge. The applicable law was the law in effect in 1991 at the time of trial. The 1994 amendment to the murder statute was a substantive change, not a procedural one, and did not apply to Appellant's new punishment hearing. Moreover, an application of the 1994 statute would create an issue involving collateral estoppel. Finally, even assuming any error, Appellant suffered no actual harm by the absence of a sudden-passion instruction in the jury charge.

ARGUMENT

RESPONSE TO APPELLANT'S SOLE POINT OF ERROR

Appellant failed to preserve this issue for appellate review. In the alternative, the trial court did not err in overruling Appellant's request for a sudden-passion jury instruction. Moreover, Appellant was not harmed by any error.

In his sole issue, Appellant contends that the trial court erred by denying his request for a sudden-passion instruction in the jury charge. His contention has no merit.

A. Relevant Facts

The jury charge at the 1991 guilt-innocence phase of trial included instructions for murder and voluntary manslaughter, as follows:

> Now therefore, if you find and believe from the evidence beyond a reasonable doubt that in Dallas County, Texas, the defendant, James Berkeley Harbin, II, on or about the 8th day of January, 1991, did intentionally or knowingly cause the death of James Berkeley Harbin, Sr., an individual, by shooting the said James Berkeley Harbin, Sr.[,] with a firearm, a deadly weapon, and the defendant was not then and there acting under the immediate influence of sudden passion, you will find the defendant guilty of the offense of murder, as charged in the indictment.
>
> Unless you so find and believe from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of murder and next consider whether the defendant is guilty of the lesser offense of voluntary manslaughter.
>
> …

> A person commits the offense of voluntary manslaughter if he causes the death of an individual under circumstances that would constitute murder, except that he causes the death under the immediate influence of sudden passion arising from an adequate cause.

(CR: 30-33). The jury charge also included an instruction on self-defense. (CR: 30-33). The jury returned a verdict of murder and sentenced Appellant to life confinement in prison. (CR: 26, 34).

During the jury charge conference at the 2017 punishment hearing, Appellant's trial counsel objected to the jury charge, as follows:

> [TRIAL COUNSEL]: I object to the Court's charge for failing to instruct the jury on what we used to call the law of voluntary manslaughter. It's now in our penal code contained in mitigation of penalty in the – in the actual murder statute where if there is indication that the defendant caused the death of the deceased under the immediate influence of sudden passion arising from that cause, the punishment range is changed from 5 to 99 or life and a fine of 2 to 20 and a fine. So I would like to have that, and I object to the omission of that from the Court's charge.
>
> [THE STATE]: And, Your Honor, the State's position is that, that instruction was submitted at the original trial during the guilt/innocence phase. The jury's already considered that charge; and therefore, it should be left out of this punishment charge.
>
> [TRIAL COUNSEL]: To which I respond that the way the charges were constructed back then, the jury had to first reach the issue of whether or not he was guilty of murder. If they did, they never passed on whether or not it was voluntary manslaughter. So therefore, that issue has not been resolved in any trial involving [Appellant]. So that's why I think it's still a viable issue.

(RR4: 95-96). The trial court overruled Appellant's objection and denied his request. (RR4: 96). The jury charge given authorized the jury to sentence Appellant to life confinement in the penitentiary or to a term of years between five and not more than ninety-nine, or five to ten years' confinement with the possibility of probation. (CR: 177-78). The jury returned a sentence of twenty-four years' confinement. (CR: 177).

B. Applicable Law

1. Jury Charge

Appellate courts follow a two-step process in reviewing jury charge error; the court first determines if the jury charge contained error and, if so, determines whether the error caused sufficient harm to warrant reversal. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

2. Current Murder and Sudden-Passion Law

Currently, under section 19.02 of the Texas Penal Code, a person commits murder if he intentionally or knowingly causes the death of an individual. Tex. Penal Code Ann. § 19.02(b)(1) (West 2011). The offense is a first-degree felony. *Id.* § 19.02(c). If a defendant is convicted of murder, he may argue at punishment that he caused the death while under the immediate influence of sudden passion arising from an adequate cause. *Id.* § 19.02(d). If the defendant establishes that he did so by a preponderance of the evidence, the offense level is reduced from

first degree to second degree and the ensuing punishment range is reduced. *Id.* § 19.02(d). Importantly, the current definition of sudden passion and adequate cause are identical to those set forth in the former voluntary manslaughter statute in effect at the time of Appellant's trial. *See Perez v. State*, 940 S.W.2d 820, 822 (Tex. App.—Waco 1997, no pet.) (stating that the 1994 Penal Code definitions of sudden passion and adequate cause had not changed from the former statute and the court would rely on prior decisions under the voluntary manslaughter law for guidance).

To be entitled to a jury instruction on the issue of sudden passion during the punishment phase, the record must at least minimally support the following inferences: (1) that the defendant acted under the immediate influence of a passion such as terror, anger, rage, or resentment; (2) that his sudden passion was induced by some provocation by the deceased or another acting with him, which provocation would commonly produce such a passion in an individual of ordinary temper; (3) that he committed the murder prior to regaining his capacity for cool reflection; and (4) that a causal connection existed "between the provocation, the passion, and the homicide." *McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005). If a defendant presents evidence of sudden passion, he is entitled to an instruction on this mitigating circumstance even if the evidence raising such an issue is contradicted, weak, or unbelievable. *Trevino*

v. State, 100 S.W.3d 232, 238 (Tex. Crim. App. 2003) (per curiam). The question is whether there was any evidence from which a rational jury could infer such passion. *Moore v. State*, 969 S.W.2d 4, 11 (Tex. Crim. App. 1998).

3. 1991 Murder and Voluntary Manslaughter Law

Before September 1, 1994, and at the time of Appellant's first trial, the existence of sudden passion was an element of the offense of voluntary manslaughter (a lesser-included offense of the separate crime of murder), to be determined by the jury at the guilt-innocence stage. *See* Penal Code Act of 1973, 63rd Leg., R.S., ch. 399, § 1, sec. 19.04(a), 1973 Tex. Gen. Laws 883, 914, repealed by Penal Code Act of 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3614; *Trevino*, 100 S.W.3d at 236–37.[1] Under that statute, a person committed the offense of voluntary manslaughter if he caused the death of a person under circumstances that would constitute murder, except that the person acted "under the immediate influence of sudden passion arising from an adequate cause." *Trevino*, 100 S.W.3d at 236. Therefore, in 1991, sudden passion was a guilt-innocence issue, and in any murder prosecution, the State was required to disprove that the defendant acted in sudden passion. *Id.* Because this

[1] Because the amendment to section 19.02 became effective in 1994, the State will refer to it as the "1994 Amendment." *See, e.g., Robinson v. State*, 945 S.W.2d 336, 340 (Tex. App.—Austin 1997, pet. ref'd).

caused some difficulties, the Legislature deleted voluntary manslaughter from the Penal Code in its 1994 amendment and transformed it into a sudden-passion punishment mitigation issue in the murder statute. *Id.*

At the time of Appellant's 1991 trial, the distinguishing factor between murder and voluntary manslaughter was the element of sudden passion. *See Fry v. State*, 915 S.W.2d 554, 557 (Tex. App.—Houston [14th Dist.] 1995, no pet.). When raised by the evidence, proof of the absence of sudden passion became an implied element of murder. *Id.* Therefore, the presence of sudden passion in a murder case raised the lesser-included offense of voluntary manslaughter. *Id. (citing Nobles v. State,* 843 S.W.2d 503, 511 (Tex. Crim. App. 1992)). Any evidence of sudden passion required the court to include an instruction on voluntary manslaughter, if requested. *Locke v. State,* 860 S.W.2d 494, 495 (Tex. App.—Waco 1993, pet. ref'd).

C. Preservation of Error

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context. *See* Tex. R. App. P. 33.1(a)(1). "The two main purposes of requiring a specific objection are to inform the trial judge of the basis of the objection so that he has an opportunity to rule on it and to allow opposing counsel to remedy the error."

Clark v. State, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). Generally, appellate courts are not hyper-technical in examining whether a party preserved error, but an appellant's complaint on appeal must comport with the complaint he made at trial. *See Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). If an appellant has not preserved an issue for appeal, the appellate court should not address it. *Clark*, 365 S.W.3d at 339. This is because if an appellant fails to preserve a complaint nothing is presented for the appellate court's review. *See Sterling v. State*, 800 S.W.2d 513, 521 (Tex. Crim. App. 1990) ("Generally, error must be presented at trial with a timely and specific objection, and any objection at trial which differs from the complaint on appeal preserves nothing for review.").

Here, Appellant has failed to preserve his stated issue for appellate review. At trial, Appellant argued to the trial court that the charge should include a sudden-passion instruction because "the way the charges were constructed" in 1991, the jury never "passed" on whether Appellant's actions constituted voluntary manslaughter, so the issue had "not been resolved in any trial" and was still a viable issue. (RR4: 95-96). On appeal, his complaint is quite different: he argues that the 1994 amendment to the Penal Code eliminating the offense of voluntary manslaughter and making it a punishment mitigation issue merely was a procedural change, not a substantive one, and therefore Texas caselaw

required the trial court to include the instruction in the charge where the evidence raised the issue.

Appellant did not argue to the trial court that the current murder statute as amended in 1994 controls the trial court's obligation to include a sudden passion instruction in a punishment re-trial from a 1991 murder conviction. Because Appellant's complaint on appeal does not comport with his objection at trial, he failed to preserve this issue for appellate review and presents nothing for this Court to review. *See* Tex. R. App. P. 33.1(a); *Clark*, 365 S.W.3d at 339. This Court should overrule his sole issue on this basis.

D. No Error

Even had Appellant preserved his complaint for review, it has no merit. The murder statute in effect in 1991 applied at Appellant's re-trial on punishment. Laws that do not amend substantive law by defining criminal acts or providing for penalties are procedural in nature. *Ex parte Johnson*, 697 S.W.2d 605, 607-08 (Tex. Crim. App. 1985). If a statute is procedural, it controls pending litigation from its effective date absent an express provision to the contrary. *Id.* However, no rigid definition of whether a statute is "procedural" or "substantive" in nature exists. *See Ex parte Scales*, 853 S.W.3d 586, 588 (Tex. Crim. App. 1993). Instead, reviewing courts "look at the changes which occur." *Id.* "As the Supreme Court noted, 'it is logical to think that the term

["procedural"] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* (quoting *Collins v. Youngblood*, 497 U.S. 37, 45-46 (1990)).

Here, the 1994 amendment to the murder statute effected substantive changes in the law of both murder and voluntary manslaughter by deleting the offense of voluntary manslaughter from the Code and moving sudden passion to the murder statute, transforming it into a punishment mitigation issue. *See Trevino*, 100 S.W.3d at 236. Importantly, because of the change, the State no longer has to disprove the issue of sudden passion as an element of murder at guilt-innocence under the current law. *See id.* at 236-37.

Also of significance, the amendment changed the burden of proof on the issue of sudden passion. *Naasz v. State*, 974 S.W.2d 418, 420 (Tex. App.—Dallas 1998, pet. ref'd). After the 1994 amendment, a defendant is now required to prove he acted with sudden passion by a preponderance of the evidence. *See* Tex. Penal Code Ann. § 19.02(d); *Naasz*, 974 S.W.2d at 420. Clearly, the 1994 amendment created significant substantive changes to and re-defined the criminal laws in the Texas Penal Code, and did not merely affect the procedure of how a trial court adjudicates a murder case. *See Scales*, 853 S.W.2d at 588; *but c.f., Johnson*, 697 S.W.2d at 607 (stating that the Legislature's 1985 amendment to article 37.10, which enlarged the authority of courts to reform judgments, was

procedural in nature as it did not define criminal acts or provide for penalties); *Wade v. State*, 572 S.W.2d 533, 534 (Tex. Crim. App. 1978) (stating the newly-enacted Speedy Trial Act applied to already-pending cases as the new law "unquestionably" related to procedure); *Ex parte Allen*, 699 S.W.2d 886, 895 (Tex. App.—Dallas 1985, pet. ref'd) (finding the 1985 amendment to article 44.38 of the Code of Criminal Procedure, which abolished the right to a motion for rehearing in extradition appeals when the order approving extradition has been affirmed, did not alter substantive law defining criminal acts or providing penalties and was procedural in nature).

Appellant's argument that the 1994 amendment to the murder statue merely was a procedural change in the law is incorrect. Notably, Appellant does not cite to any caselaw, nor has the State found any, where the appellant was charged with murder and the lesser-included offense of voluntary manslaughter under the pre-1994 statute then had an opportunity to re-litigate the element of sudden passion in a new punishment trial under post-1994 section 19.02(d). For these reasons, the trial court's ruling denying Appellant's request for a sudden-passion jury charge instruction was correct, and no error is present in the jury charge. This Court should overrule Appellant's sole issue.

E. Collateral Estoppel

In the alternative, a determination that the 1994 murder statute was applicable to Appellant's 2017 punishment hearing would create an issue implicating collateral estoppel. As mentioned above, the element of sudden passion was an element the State had to disprove in Appellant's 1991 trial at guilt-innocence to obtain a murder conviction. *See Trevino*, 100 S.W.3d at 236–37. The 1991 jury charge also included the lesser-included offense of voluntary manslaughter. A sudden-passion finding is a finding that involves issues of historical fact. *Hernandez v. State*, 127 S.W.3d 206, 211 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). "A fact is a fact, regardless of whether it is determined during the guilt stage of a criminal trial or the punishment stage." *Ex parte Watkins*, 73 S.W.3d 264, 269 (Tex. Crim. App. 2002).

"Collateral estoppel" has been defined as one aspect of the double jeopardy clause requiring "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Senson,* 397 U.S. 436, 443 (1970); *see Ex parte Taylor*, 101 S.W.3d 434, 436 (Tex. Crim. App. 2003) (holding collateral estoppel barred the State from relitigating the ultimate issue of intoxication where the appellant was acquitted of intoxication by alcohol in

a previous trial and the State sought to prosecute him for intoxication by a different type of intoxicant in a second trial).

This doctrine literally applies for the benefit of both parties in a lawsuit—not only the defendant. *Reynolds v. State,* 4 S.W.3d 13, 17–18 (Tex. Crim. App. 1999). It makes no exceptions for any modifications to accommodate "special concerns" of criminal cases, and it does not provide for its mutation into a one-way street for the benefit of only one of the parties in a lawsuit. *See Ashe,* 397 U.S. at 443*; see, e.g., Reynolds,* 4 S.W.3d at 17–18 (stating the doctrine of collateral estoppel makes no distinction between which party claims its benefit).

Courts employ a two-step analysis to determine whether collateral estoppel bars a subsequent prosecution (or permits prosecution but bars relitigation of certain specific facts). *Taylor*, 101 S.W.3d at 440. A reviewing court must determine:

> (1) exactly what facts were "necessarily decided" in the first proceeding; and
>
> (2) whether those "necessarily decided" facts constitute essential elements of the offense in the second trial.

Id. In each case, a reviewing court must review the entire trial record to determine—"with realism and rationality"—precisely what fact or combination of facts the jury necessarily decided and which will then bar their relitigation in a second criminal trial. *Id.* (citing *Ashe*, 397 U.S. at 444).

Here, the trial court in 1991 included the lesser-included offense of voluntary manslaughter in the jury charge at guilt-innocence, indicating the trial court believed at that point the evidence raised the issue of sudden passion. *See Fry,* 915 S.W.2d at 557; *Locke,* 860 S.W.2d at 495. Appellant's argument at the jury-charge conference that the jury did not have the opportunity to "pass" on the issue of sudden passion at his 1991 trial was wholly incorrect. Indeed, the jury's verdict of murder under the charge given in the 1991 trial, which included both murder and voluntary manslaughter instructions, reflects it necessarily decided that Appellant did not murder his father in sudden passion, resolving that historical fact against him. *See Ex parte Watkins*, 73 S.W.3d 264, 272 (Tex. Crim. App. 2002) (rejecting the State's argument that because "sudden passion" is no longer a guilt-innocence fact, but rather a mitigating punishment fact, it is not a fact that is subject to collateral estoppel); *Fry,* 915 S.W.2d at 557. Relitigation of that issue is barred by collateral estoppel, even if Appellant advanced new or different evidence to support the same issue already litigated at his 1991 trial. *Taylor*, 101 S.W.3d at 441 ("[I]ssue preclusion cannot be defeated simply by advancing new or different evidence to support the same issue already litigated."). For this additional reason, the trial court correctly denied Appellant's request for a sudden-passion jury instruction, and this Court should overrule Appellant's sole issue.

F. No Harm

Finally, even assuming Appellant preserved error and the trial court should have included a sudden-passion instruction in the jury charge, Appellant was not harmed by its absence. When a defendant preserves jury charge error at trial, the reviewing court must reverse if the error caused some harm. *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). "Some harm" means actual harm and not merely a theoretical complaint. *Cornet*, 417 S.W.3d at 449; *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Almanza*, 686 S.W.2d at 174. No burden of proof is associated with the harm evaluation. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Reversal is required if the error was calculated to injure the rights of the defendant. *Id.* (quoting *Almanza*, 686 S.W.2d at 171). The harm evaluation entails a review of the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel and other relevant information. *Cornet*, 417 S.W.3d at 450; *Almanza*, 686 S.W.2d at 171. The harm evaluation is case-specific. *Cornet*, 417 S.W.3d at 451.

Appellant argues that, had the trial court given the jury a sudden-passion instruction and the jury accepted it, the maximum sentence he could have received was twenty years' confinement in prison, so "harm is apparent."

Appellant's Br. at 12. During opening and closing arguments, trial counsel informed the jury that Appellant had spent twenty-four years in prison for the murder and wanted the new punishment trial because he was seeking probation to have his guilty verdict "taken away" and "his full and complete civil rights restored." (RR3: 21, 115-18). The number of years Appellant had already spent in prison — twenty-four years — was mentioned numerous times at trial. (RR3: 16, 18; RR4: 14, 22, 115-16). Trial counsel pointed out to the jury that Appellant had been in the penitentiary for over twenty-four years, and that if the jury sentenced Appellant to a ten-year, fifteen-year, twenty-year, or twenty-four-year sentence "he'd be done," but he was seeking probation. (RR4: 116-18).

The State argued that this was not a probation case and probation here would not equal justice. (RR3: 15; RR4: 111-12). The trial court gave the jury the choice of sentencing Appellant to either life confinement, a term of years, or probation, and the jury chose twenty-four years confinement. (CR: 177-78). The jury's significant reduction of Appellant's sentence from life confinement in the penitentiary to twenty-four years' confinement, the time trial counsel told the jury would cause Appellant to be "done" with his prison time and the time the jury had heard repeatedly was the time Appellant had already served, reflects that it considered Appellant's mitigating punishment evidence. The new twenty-

four-year sentence, or time-served, shows Appellant suffered no actual harm. *See Cornet*, 417 S.W.3d at 450.

Moreover, even had the jury charge included an instruction on sudden passion, the jury would have found against Appellant on that issue. In 2017, Appellant changed his justification for shooting Jackie from his 1991 justification of self-defense to "battered child syndrome." Appellant presented testimony from an expert witness that he was suffering from this condition when he shot Jackie, and his own testimony was that he decided to shoot Jackie after suffering from years of verbal and physical abuse. Jackie made a lewd comment about his mother and sister during their argument over him dropping out of school, and he then decided to shoot Jackie "because it was apparent that this dude was just not gonna stop and not gonna stop."

The State, however, pointed out to the jury that Appellant did not reveal this lewd sexual comment fact until twenty years after the original trial, and he was only now doing so to get mitigation in punishment. (RR4: 69, 110). The State argued at closing and the evidence reflected that Appellant did not make a "split second decision" to murder Jackie that day. (RR4: 109). Appellant, who already owned multiple guns, used a fake ID to purchase the murder weapon four months before the murder. (RR4: 60, 109). Indeed, Appellant told Gish he wanted to kill Jackie two days before the murder, relayed to Gish his detailed

plan, and tried to enlist Gish's help. Dr. Price testified that talking about murdering their abuser in advance was not unusual for individuals suffering from battered child syndrome and that Appellant displayed some antisocial characteristics.

The evidence also showed Appellant precipitated the confrontation with Jackie. He knew Jackie would be angry with him about dropping out of school, but he deliberately woke him to discuss his decision to do so and took him to a secluded area. Appellant testified that he "decided" to shoot his father after he made the lewd comment about his mother and sister; he walked to his car, removed a loaded gun, and shot his father seven times in the back and back of the head. Appellant testified that after emptying the magazine into Jackie, he was afraid he had not killed him and "I didn't want not to have that," so he ran back to the car to retrieve another loaded magazine. (RR4: 74). This overwhelming evidence that Appellant planned the murder and precipitated the confrontation leading to the shooting likely would have caused the jury to reject a sudden-passion mitigation issue. *See Smith v. State*, 355 S.W.3d 138, 149 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (holding evidence sufficient to support the jury's rejection of sudden passion where the defendant precipitated the confrontation that led to the victim's death).

Any error by the trial court in omitting an instruction on sudden passion did not cause Appellant to suffer actual harm, only theoretical harm. This Court should overrule Appellant's sole issue.

PRAYER

The State prays that this Honorable Court will affirm the trial court's judgment.

Respectfully submitted,

/s/ Marisa Elmore

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CERTIFICATE OF WORD-COUNT COMPLIANCE

I hereby certify that the foregoing brief, including all contents except for the sections of the brief permitted to be excluded by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, is 5,047 words in length according to Microsoft Word 2016, which was used to prepare the brief, and complies with the word-count limit in the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 9.4(i).

/s/ Marisa Elmore
Marisa Elmore

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief was served on Lawrence B. Mitchell, counsel for Appellant, by electronic communication through eFileTexas.gov to judge.mitchell@gmail.com, on November 28, 2018.

/s/ Marisa Elmore
Marisa Elmore